Supreme Court, U.S.
FILED
JUL 10 1997
OFFICE OF THE CLERK

(3)

Case No. 96-1717

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

FREE AIR CORPORATION,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

Stephen T. Yelverton, Esq.
Counsel of Record
Yelverton Law Firm, P.C.
1101 30th St., N.W.,
Suite 500
Washington, D.C. 20007
Tel. 202-625-4321

July 1997

9 pp

TABLE OF CONTENTS

Page(s)

Petitioner's Reply Brief 1

Arguments 1

The FCC Ignored a Key Issue Raised in the Petition for Writ of Certiorari 1

The FCC Improperly Characterized its Conclusions of Law as Findings of Fact 2

The FCC's Attack on Mrs. Castellanos Demonstrates Gender Discrimination 5

Conclusions 6

TABLE OF AUTHORITIES

Page(s)

FCC Decisions

Freeze Orders, 9 FCC Rcd 1055 (1994) 1

U.S. Supreme Court Decisions

Blau v. Lehman, 368 U.S. 403 (1962) 2

Link v. Wabash Railroad Co., 370 U.S. 626 (1962) 1

National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) 4-5

Societe Internationale v. Rogers, 357 U.S. 197 (1958) 2, 4

Orders and Opinions in the Proceeding

Hearing Designation Order, 3 FCC Rcd 4375 (MMB 1988) 1

PETITIONER'S REPLY BRIEF

The Petitioner, Free Air Corporation ("Free Air"), hereby submits its reply to the opposition brief of the Respondent, Federal Communications Commission ("FCC").

ARGUMENTS

The FCC Ignored a Key Issue Raised in the Petition for Writ of Certiorari

The opposition brief of the FCC ignored a key issue raised by Free Air in its brief, at pp. 14-16. That issue is whether the Court's decision in Link v. Wabash Railroad Co., 370 U.S. 626 (1962), upholding the authority of tribunals to dismiss litigants for failure to prosecute, should be expressly limited to circumstances where the litigant has engaged in a protracted pattern of delay or neglect in prosecuting its case, and not just a single instance (even if done in bad faith), where lesser sanctions would be appropriate.

In the case of Free Air, the FCC found only a single instance of delay (App. 21a). This one instance occurred after six years of active and continuous prosecution by Free Air of its case. Hearing Designation Order, 3 FCC Rcd 4375 (MMB 1988). This one instance of delay also occurred after the FCC had "frozen" the prosecution of its broadcast hearing proceedings. Freeze Orders, 9 FCC Rcd 1055 (1994).

The FCC Improperly Characterized its Conclusions of Law in this Case as Findings of Fact

In its opposition brief, the FCC improperly characterized its conclusions of law in this case as findings of fact. See, Blau v. Lehman, 368 U.S. 403, 409 (1962). The FCC did so in an attempt to make it appear that the facts of Free Air's case do not come within the holding of Societe Internationale v. Rogers, 357 U.S. 197 (1958). This decision holds that an "inability" to comply with a trial or hearing schedule does not warrant the sanction of dismissal.

According to the FCC, at p. 8, Free Air's failure to comply with the hearing schedule resulted from its "willful" decision, not from an "inability" to comply. However, the FCC ignored uncontroverted matters in the record demonstrating Free Air's inability to comply with the hearing schedule (App. 1a-4a).

Several weeks prior to the scheduled hearing in Washington, D.C., the ALJ denied a joint motion for continuance and ordered a principal of Free Air, Olga V. Castellanos, to testify as an "essential" witness. This was in spite of the fact that she was then undergoing post-surgery radiation treatments for breast cancer at a Miami, Florida, hospital. The ALJ knew of Mrs. Castellanos' long-standing medical condition, did not then request or demand

a further statement from her doctor, and ordered that the hearing would be held regardless of her medical condition (App. 1a-4a).

Because of the ALJ's refusal to continue the hearing and his order for Mrs. Castellanos' to testify as an "essential" witness, in spite of the fact that she was then undergoing post-surgery radiation treatments for breast cancer, Free Air was forced into a position where it would be in default at the scheduled hearing because of the unavoidable absence of Mrs. Castellanos. Free Air thereby elected to prosecute its case through a motion to delete the financial issue in question in order not to be in default.

Another conclusion of law that the FCC improperly characterized as a finding of fact is that Mrs. Castellanos refused to testify merely to prevent Free Air's financial qualifications from being scrutinized by the opposing applicants. See, FCC Opposition Brief, at p. 8. However, the FCC ignored the fact that Free Air's motion to delete included all documentation as to its financial qualifications, along with an affidavit from Mrs. Castellanos detailing the basis of her 1986 financial certification. This documentation had been produced to the opposing parties during discovery (App. 3a, 8a-9a).

The matters included in the motion to delete would have been the same matters to be submitted in a hearing exhibit. Indeed,

it would have been the same showing to be presented at the hearing, other then Mrs. Castellanos' live testimony, which was not possible to be given.

This full disclosure by Free Air of its financial qualifications in the motion to delete wholly refutes the unsupported contention of the FCC, in its opposition brief, at p. 8, that Mrs. Castellanos refused to attend the hearing and testify in order to prevent Free Air's financial qualifications from being scrutinized by the opposing applicants. Free Air's financial disclosure demonstrates that it was acting in "good faith" to prosecute its application and that its actions clearly bring it within the holding of Societe Internationale v. Rogers, 357 U.S. 197.

In its opposition brief, at p. 2, the FCC suggested that Free Air failed to comply with document discovery requests. However, it ignored that the ALJ determined that Free Air had complied with such discovery requests in "good faith" (App. 3a). This compliance with document discovery requests further brings Free Air's actions within the holding of Societe Internationale v. Rogers.

The reliance of the FCC, in its opposition brief, at pp. 6-7, on National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642-643 (1976), is wholly misplaced. In that case, the dismissed party failed to comply with

discovery requests over a seventeen month period. Id., 640. As previously noted, in the case of Free Air, the ALJ determined that it had complied with discovery in "good faith" (App. 3a). Moreover, as previously noted, another fact which distinguishes National Hockey League is that Free Air's failure to comply with the hearing schedule resulted from Mrs. Castellanos undergoing post-surgery radiation treatment for breast cancer.

The FCC's Attack on Mrs. Castellanos Demonstrates Gender Discrimination

The FCC's attack on Mrs. Castellanos, in its opposition brief, at p. 8, contending (contrary to the record) that she refused to attend the scheduled hearing merely to prevent Free Air's financial qualifications from being scrutinized, and not because she was suffering from breast cancer and undergoing post-surgery radiation treatments, demonstrates gender discrimination of the worst sort. See, Petitioner's Brief, at pp. 17-19.

This unwarranted attack on Mrs. Castellanos' character by the FCC and flimsy rationalization for its decision convincingly shows that it does not take seriously the medical complications resulting from breast cancer --- an illness unique to women. According to the FCC, breast cancer is just an excuse for women to use and is not a real illness.

CONCLUSIONS

WHEREFORE, in view of the foregoing, the Court is urged to grant Free Air's petition for writ of certiorari.

Respectfully submitted,

Stephen T. Yelverton, Esq.
Counsel of Record
Yelverton Law Firm, P.C.
1101 30th St., N.W., Suite 500
Washington, D.C. 20007
Tel. 202-625-4321

July 1997